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No. 00-949

In the Supreme Court of the United States

October Term, 2000

George W. Bush and Richard Cheney,
Petitioners,

v.

Albert Gore, Jr. et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF *AMICUS CURIAE* OF THE NATIONAL BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The National Bar Association ("NBA"), founded in 1925, is the nation's oldest and largest national association of predominately African American lawyers and judges.[1] Through its 87 affiliate chapters, the NBA represents a professional network of over 17,000 lawyers, judges, educators and law students. The NBA's purposes include protecting the civil and political rights of all citizens of the United States. The NBA is nonprofit and nonpartisan.

Over the past five decades, NBA members have participated in most of the nation's seminal voting rights cases. The NBA has

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1 As it goes to press, the process of securing consents of the parties has not been completed. Consequently, if *amicus curiae* is unable to file this brief pursuant to S. Ct. Rule 37.3(a) with the consent of the parties, the brief will be supported by a motion pursuant to S. Ct. Rule 37.3(b). Pursuant to S. Ct. Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

convened a twenty-member Elections/Voting Rights Task Force to seek long term reform of federal and state election procedures. The proposals in Section II of this brief were developed by the Task Force.

The NBA will not repeat the parties' arguments on questions of Florida law and federal constitutional law. Instead, as an *amicus curiae*, the NBA wishes to raise issues unlikely to be directly addressed by the parties. The NBA seeks particularly to enrich this Court's review by placing the issue of vote tallying and recording in historical context.[2] The NBA also prays that this Court would call attention to several noncontroversial potential initiatives whose adoption could enhance public confidence in elections and prevent all but the most rare election litigation from arriving at any court's doorstep.

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2 While the NBA supports neither side in this case, out of an abundance of caution its brief is captioned "in support of respondents" because one of its arguments (Section I *infra*) expresses skepticism of petitioners' prayer for relief, given the history of efforts to discourage the casting of legal ballots and to diminish the effect of such ballots once cast.

SUMMARY OF ARGUMENT

The unfortunate and unique circumstances of this case obscure the relative simplicity of the equities. More blood has been spilled in this century over the right to vote than over any other privilege of citizenship. America has put an end to the White primary and racial gerrymandering -- techniques that prevented African Americans from voting at all. It has rejected apportionment systems rigged so that certain votes counted far less than other votes. And it has renounced literacy tests, poll taxes, grandfather and "fighting grandfather" clauses that discouraged or prevented African Americans from casting a vote. This long and ignoble history provides the context for the issue of whether to completely tally and record legal votes.

In an accurate and fair election, completeness and finality are symbiotic rather than antagonistic goals. Guided by this principle, the NBA's Elections/Voting Rights Task Force has set out a wide range of noncontroversial, nonpartisan, race-neutral standards and procedures whose adoption could restore public confidence in the sanctity of the franchise and hasten the day when this

or any Court will seldom have occasion to hear an election case. We ask only that this Court note the existence of these potential reforms, and commend them to legislatures, agencies and the bar for thoughtful consideration.

ARGUMENT

I. Failure To Tally And Record All Legal Votes Disenfranchises Voters And Undermines Democracy

In any election case, every court should begin by recognizing that

> [t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.[3]

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3 *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Tactics that infringe on this right are an unfortunate but hardly a recent creation of politics. While such tactics have been visited repeatedly and notoriously on the descendants of slaves,[4] they have sometimes had a nonracial cast,[5] as in the issues framed by the parties now before this Court.

The imperfect and colloquial public perception of this case is that a litigant named Finality has engaged in battle against a litigant named Completeness. Each litigant has virtues. This Court ought not assume that Finality intends to disempower the voters. Absent crossexamination, discerning the intent of private parties eludes all tribunals; even the intent of public actors is

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4 *See, e.g. Nixon v. Herndon*, 273 U.S. 536 (1927) (outlawing the White primary).

5 *See, e.g. Baker v. Carr*, 369 U.S. 186 (1962) (holding that the malapportionment claims of large cities were justiciable).

difficult to divine in election litigation.[6] Nonetheless, even a well-intended effort to persuade a tribunal to eschew the tallying and recording of legal votes inevitably would have the effect of disempowering the voters.

The contentions of those favoring such an outcome are open to a skepticism informed by the history of African America's journey to the ballot box. The soil of the American South is yet damp with the blood of martyrs to the dream of an accessible and meaningful ballot.[7] Paying with their lives, civil rights heroes delivered us the very hallmark of democracy: the citizen's confidence that he may exercise his right to cast a ballot at his polling place, and that the vote he

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6 In *Rogers v. Lodge*, 458 U.S. 613, 620-21 (1982), *rehearing denied*, 459 U.S. 899 (1982), this Court eased the evidentiary standard for proof of racial vote dilution, substantially modifying the intent-based rule of *Mobile v. Bolden*, 466 U.S. 55 (1980).

7 In *Parting the Waters* 485-91 and 507-15 (1988), Taylor Branch describes at length how it was in the early 1960s "that Negroes could always be gunned down with impunity for showing interest in the ballot." *Id.* at 510.

thought he cast there will be recorded in the election.[8] That confidence, flowing directly from the fundamental principle that "[n]o man is good enough to govern another man without that other's consent",[9] is so embedded in our psyches that most Americans are no longer conscious of it. The sanctity of the franchise has "become part of our national culture."[10]

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8 This Court has declared that it is "as equally unquestionable that the right to have one's vote counted is as open to protection ... as the right to put a ballot in a box." *United States v. Mosley*, 238 U.S. 383, 386 (1915). As Mr. Justice Douglas characterized the issue,

> There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted.

South v. Peters, 339 U.S. 273, 279 (Douglas, J., dissenting), *rehearing denied*, 339 U.S. 959 (1950).

9 Abraham Lincoln, Speech, Peoria, IL, October 16, 1854.

10 *Dickerson v. United States*, 120 S.Ct. 2326, 2336 (2000) (Opinion by Rehnquist, J.) (reaffirming the holding of *Miranda v. Arizona*, 384 U.S. 436, 479 (1966)).

America arrived at this promised land after traversing a history littered with abhorrent disenfranchising tricks and devices. Today's failure to tally and record legal ballots is the ill-begotten child of three overlapping generations of disenfranchisement schemes. The great-grandfather of not tallying and recording legally cast ballots was a set of voter eligibility rules that prevented African American voters from voting at all.[11] Its grandfather was an apportionment system rigged so that some legally cast votes counted far less than other votes.[12] And its father was an array of voter disqualification devices that discouraged or

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11 *See, e.g., Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (outlawing deliberate racial gerrymandering); *Nixon v. Herndon, supra.*

12 *See Baker v. Carr, supra.*

prevented otherwise eligible Americans from casting their votes.[13]

Thankfully, these disenfranchisement techniques seldom arrive anymore on this Court's docket. Yet they cast a long shadow over the instant litigation.

As the repository of the nation's judicial history, this Court should note the lineage of the disenfranchisement technique that has raised its head in this case. While casting no aspersions on the intentions of its proponents, this Court should hold to the most exacting burden of persuasion anyone who seeks to

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[13] *See Oregon v. Mitchell*, 400 U.S. 112 (1970) (outlawing literacy tests); *Harper v. Va. Board of Elections*, 383 U.S. 663 (1966) (outlawing the poll tax). Ingenious and elaborate waiver mechanisms were applied to ensure that literacy and residency schemes disenfranchised only voters of color. *Cf. Giles v. Harris*, 189 U.S. 475 (1903) (discussing the "fighting grandfather" clause, which enabled Whites to avoid literacy tests).

prevent the tallying and recording of legally cast votes.[14]

II. This Court Should Encourage Legislatures, Agencies And The Bar To Consider A Wide Range Of Election Reforms

In times of actual or even perceived constitutional crisis, this Court is uniquely positioned and endowed with the power and duty to encourage national unity and public confidence in our system of democracy. This Court has often enriched its opinions with steadying words that have healed the nation

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14 As the Florida Supreme Court held unanimously when it rejected a request to exclude votes from being recorded because they were not timely reported to the Secretary of State, the contesting candidate

> has presented no *compelling reason* for disenfranchising the 11,000 residents of Flagler County who cast their ballots on November 8.

State ex rel. Chappell v. Martinez, 536 So. 2d 1007, 1009 (Fla. 1988) (emphasis supplied).

facing a crisis[15] or when the law simply must be writ large enough for all to see.[16] When

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[15] This Court's steadying hand did its most honorable work in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) ("*Brown I*"). Chief Justice Warren's unanimous opinion went out of its way to explain to the nation its holding that separate public schools are inherently unequal, pointing out that education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *See also Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (holding that "[n]o state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.") Each justice helped reaffirm the essential principle of federalism by personally signing this Court's unanimous opinion.

[16] Even when no national crisis is apparent, the facts of a case may cry out for statesmanlike words and expansive explanations of this Court's reasoning. A prime example: by 1968 it had become obvious that hundreds of school systems had misinterpreted the infamous "with all deliberate speed" formulation of *Brown v. Board of Education*, 349 U.S. 294, 301 (1955) ("*Brown II*"). This Court spoke expansively in explaining why *de jure* segregated school systems have

[n. 16 continued on p. 12]

steadying the nation requires prospective reform, this Court should not hesitate to say so.[17]

In that spirit, we ask this Court to call attention to the existence of a wide range of noncontroversial, nonpartisan, race-neutral standards and procedures whose implementation could help restore public confidence in the democratic process and

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16 [continued from p. 11]

an affirmative duty to desegregate, rather than merely to decline to enforce segregation. *Green v. County School Board*, 391 U.S. 430, 438 (1968) (holding that an ostensible desegregation plan that "fails to provide meaningful assurance of prompt and effective disestablishment of a dual system" is intolerable.) Three years later, this Court spoke with equal force in explaining why the use of arbitrary barriers to the employment of members of minority groups could no longer be tolerated. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

17 *See, e.g., Brown I, supra*, 347 U.S. at 495 (ordering further proceedings which would take account of "the wide applicability of this decision, and ... the great variety of local conditions ...."

diminish the likelihood that elections will be litigated. We do not ask this Court to endorse any of the proposals we set out below. Instead, we ask only that this Court observe that they may be worthy of study by legislatures, agencies and the bar.[18]

The proposals we summarize below are among those which the NBA is transmitting to its fellow national bar associations for their consideration, study and endorsement.

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[18] Some reforms must come from the body politic itself. Desirable as they may be, this Court might be unable to find, within its powers under Article III, Section 2 of the Constitution, authority even to draw attention to the need for ballot literacy efforts to ensure that eligible voters know how to cast a ballot, or the need to ensure that voting procedures keep pace with demographics and technology. The proposals set out herein are limited to subjects that have found, or might find their way into the courtrooms of Article III judges.

1. Election integrity: ensuring that every eligible voter, and no other person, can cast a vote

    a. States should adopt procedures to ensure that every person presenting himself at the polls should be allowed to vote (by regular ballot, or by affidavit or protest ballot) if he is listed on the rolls *or* possesses identification or a valid voter registration card or other identification, and if he executes a competent written declaration that, to the best of his knowledge, he is eligible to vote.

b. States might consider uniform, enhanced procedures to prevent absentee and mail ballot fraud or coercion. Reforms that might be considered include bright-line, uniform rules governing the types of absentee or mail ballot irregularities for which the remedy is disqualification of the ballot, and more clearly defining the rights of political parties and other groups' permissible involvement in distributing absentee ballot applications and in collecting and presenting absentee ballots.

c. States, and the federal government, might endeavor to harmonize their criminal statutes aimed at preventing and remedying election tampering, whether caused by negligence, intentional misconduct or fraud.

2. Access to the franchise: removing even the appearance of impediments to registering and voting

   a. Registration by mail, fax, online, or by any other reliable means should be encouraged by every state. Registration deadlines should not be needlessly early, nor should durational residency requirements be inconsistent with the customary practices of other states.

   b. Absentee and mail ballots should be treated as overnight/expedited by the U.S. Postal Service.

   c. Those in line to vote when the polls close should never be turned away.

   d. There should be a sufficient number of polling places in each community to accommodate all voters without substantial delay.

e. Changes in polling locations should be widely publicized in advance, with mailed notices to registered voters using the relocated site. Those who nonetheless appear at their former polling site should be given directions and a map showing the new site.

f. Sufficient staff and telephone lines should be available at each county clerk's office to facilitate the receipt of calls from precinct poll workers without extensive delays or busy signals.

g. Voter lists should be current as of the date of the election, so that no registered voter will be turned away.

h. States might consider minimum standards for polling places, ensuring that they will have sufficient voting machines and staff to ensure that voters seldom must wait more than a few minutes to vote; that they are fully handicapped-accessible; that voters have sufficient space to wait indoors to vote; that they are heated and well-lit; and that translators are be available, in person where possible and otherwise electronically.

i. Reducing impediments to voting turns in part on the quality of service provided by poll workers. Ultimately, states might aim to certify all poll workers, thereby assuring the public that poll workers have recently been instructed in the basics of election law and procedure.

j. Poll workers should encourage voters to ask for help or for a substitute ballot if needed. Poll workers might say to each voter: "You can ask me a question at any time. Even after you go into the voting booth, it's OK for you to come out and ask me for help. If you make a mistake, I will be happy to give you another ballot." Through repetition, this uniform incantation would ideally achieve the universality and public acceptance of a *Miranda* warning.

3. Procedural fairness: ensuring that states' dissimilar voting procedures are nonetheless fair and evenhanded

   a. A Restatement of Election Law would provide a quick reference guide to customary practices.

b. Each state attorney general might consider designating a representative to meet at least annually with his counterparts from every other state in an effort to consider equalization or harmonizing of widely disparate election procedures.

4. Mathematical accuracy: ensuring accurate and complete vote counts and recounts

a. Local election officials should endeavor to standardize and simplify ballot design and eliminate confusing designs such as the butterfly ballot and two-page ballot listings of candidates for the same office.

b. A standard ballot form should be designed by social scientists and thoroughly tested for ease of use, machine readability, and accuracy in hand tabulators' discernment of voter intent.

c. Machinery used to tabulate votes should meet standards for accuracy established by a national public scientific body recognized for establishing quality standards.

d. States should be encouraged to adopt universal, easy to interpret standards governing when a machine recount will be held, when a manual recount will be held, how these recounts will be performed, who will perform them, the standards to be used to perform them, and when they should be completed. Universal, easy to interpret standards should also govern contests, certifications and protests.

5. Equality under the law: eliminating all vestiges of disenfranchisement based on race, language, social class or perceived political affiliation

   a. Polling places, voting machines and staff should be proportionately distributed, so that no groups of voters will have to wait relatively longer in line.

   b. Translators should be available, in person or electronically, at each polling place.

   c. No voter should be asked for more (or more detailed, *e.g.*, photo) items of identification than any other voter.

   d. Police departments should be discouraged from taking steps (intentionally or otherwise) that could create the appearance of efforts to disenfranchise voters, *e.g.*, checkpoints, sobriety roadblocks, or other enhanced efforts to stop motorists in the vicinity of polling places.

e. Legislatures might consider adopting procedures for expedited review of allegations of voting irregularities.

CONCLUSION

This Court should hold proponents of not tallying and recording legally cast votes to the exacting burden of persuasion justified by our electoral history.

Our system has stumbled when an election case arrives in any court. Consequently, this Court would perform a valuable public service by drawing attention to the many noncontroversial, nonpartisan, race-neutral standards and procedures available to a nation seeking to heal itself and make more perfect its union.

Respectfully submitted,

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